

The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005

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Title I: Securing United States Borders

Section 101 – Achieving Operational Control on the Border

This section directs the Secretary of Homeland Security to take all actions necessary and appropriate to achieve and maintain operational control over the entire land and maritime border of the United States through systematic surveillance coverage, additional physical infrastructure, hiring all Border Patrol agents authorized in the Intelligence Reform Act, and properly deploying Border Patrol agents to high risk areas and other impacted border areas.

Section 102 - National Strategy for Border Security

Subsection (a) requires the Secretary to submit a plan within six months to provide systematic surveillance coverage on the United States land borders by integrating current capabilities with new surveillance technology, coordinate with the Science and Technology Directorate within the Department to identify and test technology, outline specific technology that will be added to the border, identify obstacles to deployment, and detail costs.

Subsection (b) requires the Secretary to submit a comprehensive plan for border security within one year that will outline how the Department will achieve operational control over the border. The plan must include an implementation timeline for the surveillance plan in subsection (a), a risk assessment of ports of entry and the entire border relating to the prevention of unauthorized entry by terrorists and illicit materials, an outline of additional staffing and resources necessary, a description of the border security roles and missions of Federal, state,

and local authorities, prioritization of research, a description of ways to ensure free flow of legitimate goods and travel across the border, an assessment of necessary detention space, a plan for personnel accountability, and a timeline.

Subsection (c) requires that in developing the National Strategy for Border Security in subsection (b) that the Secretary consult with State, local and tribal authorities along the border and an appropriate cross-section of private sector and non-governmental organizations.

Subsection (d) sets the National Strategy for Border Security in subsection (b) as the priority document for border security.

Subsection (e) reinforces that immediate action is necessary and nothing in subsection (b) shall relieve the Secretary of the responsibility of taking all actions necessary to gain and maintain operational control over the land and maritime borders of the United States.

Section 103 – Implementation of Cross-Border Security Agreements

This section requires the Secretary to report within six months on the implementation of cross-border security agreements with Canada and Mexico, such as the Smart Border Accord and the Security and Prosperity Partnership of North America. After the initial reporting requirement, the Secretary is required to provide regular updates to the Committee on the progress.

Section 104 – Biometric Data Enhancement

This section requires that by October 1, 2006, the Secretary of Homeland Security enhance the connectivity between the Automated Biometric Identification System (IDENT) and Integrated Automated Fingerprint Identification System (IAFIS) biometric databases and collect 10-fingerprints from individuals through the United States Visitor and Immigrant Status Indicator Technology (US-VISIT) program during their initial enrollment.

Section 105 – One Face at the Border Initiative

This section requires the Secretary to submit a report to the Committee on the benefits, improvements planned, and personnel statistics related to the “One Face at the Border” inspection initiative at United States ports of entry.

Section 106 - Secure Communication

This section requires the Secretary to immediately develop plans for secure, two-way communication between Border Patrol agents in the field and between agents and their respective station offices.

Section 107 – Port of Entry Inspection Personnel

This section authorizes necessary funding to hire 250 additional port of entry inspection personnel over the preceding year for each of the Fiscal Years 2007 through 2010.

Section 108 – Canine Detection Teams

This section authorizes necessary funding to increase by 25 percent the number of canine detection teams over the preceding year utilized by the Department of Homeland Security at or between United States ports of entry.

Section 109 – Secure Border Initiative Financial Accountability

Subsection (a) requires the Department of Homeland Security Inspector General to review all contract actions on the Secure Border Initiative over \$20 million to ensure compliance with cost requirements, performance objectives, program milestones, and timelines.

Subsection (b) requires the Inspector General to review all contract actions under subsection (a) within 60 days after the date of initiation of the action and upon conclusion of the contract.

Subsection (c) requires the Inspector General, after completion of the review in subsection (a), to report the findings to the Secretary of Homeland Security.

Subsection (d) requires the Secretary of Homeland Security to report to the Committee within 30 days after receiving the report from the Inspector General required in subsection (c) on steps the Secretary has taken or will take to remedy any problems identified in such report.

Section 110 – Border Patrol Training Capacity Review

This section requires the Government Accountability Office (GAO) to review Border Patrol basic training conducted at the Federal Law Enforcement Training Center (FLETC), compare the training program with similar law enforcement training programs conducted by State or local law enforcement entities, universities, and the private sector. The review will also include recommendations

on how to make the Border Patrol training more cost effective.

Section 111 – Airspace Security Mission Impact Review

This section requires the Secretary of Homeland Security to report to the Committee on the impact the National Capitol Region (NCR) airspace security mission has on border security missions, including required resources to fulfill the mission and the impact of transferring assets from the border to provide coverage in the NCR.

Section 112 – Repair of Private Infrastructure on Border

Subsection (a) requires the Secretary of Homeland Security, subject to the availability of appropriations to reimburse property owners for costs associated with repairing damage to their private infrastructure constructed along the international border if those damages are the result of entry by illegal aliens. This damage must be confirmed by Homeland Security personnel.

Subsection (b) requires that the reimbursement provided not exceed the value of the infrastructure prior to the damage.

Subsection (c) requires a report every six months until appropriated funds are expended detailing the circumstances in which funds were expended under this account.

Subsection (d) authorizes \$50,000 for each fiscal year to carry out this section.

Section 113 – Border Patrol Unit for the Virgin Islands

This section requires the Secretary of Homeland Security to establish a Border Patrol unit on the Virgin Islands by September 30, 2006.

Section 114 – Report on Progress in Tracking Travel of Central American Gangs Along the International Border

This section requires the Secretary of Homeland Security to submit a report on the progress the Department is making in tracking the travel of Central American gangs into the United States and Mexico.

Section 115 – Collection of Data

This section requires the Secretary of Homeland Security to submit an annual report on the number of unauthorized aliens taken into custody by the Border Patrol requiring medical care, the Border Patrol refers to hospitals for treatment, U.S. Customs and Border Protection personnel admit into the U.S. for emergency medical care, and who are taken into custody by the Department after receiving medical treatment.

Section 116 – Deployment of Radiation Detection Portal Equipment at U.S. Ports of Entry

Subsection (a) requires the Secretary of Homeland Security to deploy radiation portal monitors at all U.S. ports of entry within one year after the date of enactment.

Subsection (b) requires a report 180 days after enactment on the progress toward the deployment in subsection (a).

Subsection (c) authorizes appropriate funds to carry out this section.

Section 117 – Consultation with Businesses and Firms

In implementing the Secure Border Initiative, the Secretary of Homeland Security shall conduct outreach with the private sector and other appropriate entities to improve cost-effectiveness, systems integration, resource allocation, and financial accountability.

Title II – Combatting Alien Smuggling and Illegal Entry and Presence

Section 201: This section amends the definition of aggravated felony in the Immigration and Nationality Act to include all smuggling offenses, and illegal entry and reentry crimes where the sentence is a year or more. It also brings the aggravated felony definition in line with federal criminal law by expanding it to include solicitation and assistance in specified offenses.

Section 202: This section amends the alien smuggling provisions of the INA to include offenses where the offender acts in reckless disregard of the fact that the smuggled person is an alien not allowed to enter. Places mandatory minimum sentences on smuggling convictions. Facilitates DHS's efforts to seize smugglers' property and modifies the government's burden in showing that a smuggled alien did not have permission to enter.

- Section 203: This section makes illegal presence in the United States a crime, and expands the penalties for aliens who illegally enter the U.S. or who enter or are present illegally following convictions of certain crimes. It also expands the penalties for marriage and immigration-related entrepreneurship fraud.
- Section 204: This section – based on Representative Issa’s “Criminal Alien Accountability Act” – sets mandatory minimum sentences for aliens convicted of reentry after removal.
- Section 205: Also based on the “Criminal Alien Accountability Act,” this section imposes on smugglers the same sentences that the aliens they have smuggled would receive.
- Section 206: This section adds smuggling crimes to the list of crimes the use or carrying of a firearm during the commission of results in criminal sentencing enhancements.
- Section 207: This section clarifies that the provision barring entry to aliens who have made false claims to U.S. citizenship also applies to aliens who have made false claims to U.S. nationality. It also provides that DHS shall have access to any information kept by any federal agency as to any person seeking a benefit or privilege under the immigration law.
- Section 208: A voluntary departure agreement between an alien and the government allows an alien to agree to leave the United States within a specified time period on his own volition rather than formally being ordered removed. Under section 208, the maximum period of voluntary departure before the end of proceedings is reduced from 120 to 60 days, and aliens receiving such benefit must post a bond or show that a bond would create a hardship or is unnecessary. In order to receive this benefit, the alien must waive all rights to appeal. This would not prevent the alien from taking a subsequent appeal, but such appeal would invalidate the voluntary departure grant, as would the alien’s failure to depart. Failure to depart in violation of such an agreement would subject the alien to a \$3,000 fine and render the alien ineligible for various immigration benefits for 10 years after the alien’s ultimate departure. An alien who violates the agreement by failing to depart may not reopen his removal proceedings, except to apply for withholding of removal or protection under the Convention Against Torture.
- Section 209: Some 480,000 absconders – aliens who are under final orders of removal but have evaded apprehension and removal by DHS – are currently in the United States, and approximately 40,000 new absconders are added each year. Under current

law, aliens ordered removed are barred from readmission for a period of years after removal, but aliens can avoid this penalty by simply remaining in the United States after being ordered removed. Section 209 imposes the same bar on aliens who do avoid removal. It also bars aliens who fail to depart or hamper their removal from discretionary relief.

Title III: Border Security Cooperation and Enforcement

Section 301 – Joint Strategic Plan for United States Border Reconnaissance and Support

Subsection (a) requires the Secretary of Homeland Security and the Secretary of Defense to develop a joint strategic plan to increase the availability of Department of Defense surveillance equipment using their current authority under chapter 18 of title 10 U.S.C., to assist the Department of Homeland Security's along the international land and maritime borders of the United States.

Subsection (b) requires the Secretary of Homeland Security and the Secretary of Defense to submit a report to the Congress within six months describing the Department of Defense will assist with border security surveillance operations of the Department of Homeland Security, provide a copy of the joint strategic plan, and describe the type of equipment and support to be provided under the joint strategic plan.

Subsection (c) provides that this section will not alter or amend the prohibition on the use of the Army or the Air Force as a posse comitatus under section 1385 of title 18 U.S.C.

Section 302 – Border Security on Protected Lands

Subsection (a) requires the Secretary of Homeland Security to assess border security vulnerabilities on Department of Interior land directly adjacent to the international land border of the United States to prevent the entry of terrorists and illicit materials.

Subsection (b) requires the Secretary to provide additional border security assistance as necessary based on the evaluation in subsection (a).

Section 303 – Border Security Threat Assessment and Information Sharing Test and Evaluation Exercise

This section requires the Secretary of Homeland Security to conduct a training exercise on border security information sharing within one year after the date of

enactment. The exercise shall involve officials from all levels of government and representatives from the private sector, test the Nation's capacity to detect and disrupt threats to the integrity of the border, and evaluate information sharing capabilities between the participants. The Secretary is required to report to the Committee with an assessment of the exercise.

Section 304 – Border Security Advisory Committee

Subsection (a) establishes an advisory committee for the Secretary of Homeland Security.

Subsection (b) requires the advisory committee to advise the Secretary on issues relating to border security and enforcement along the international land and maritime borders of the United States.

Subsection (c) requires the Secretary to appoint to the advisory committee representatives from State and local governments, community groups, and tribal authorities located in States along the international land and maritime borders of the United States.

Section 305 – Permitted Use of Homeland Security Grant Funds for Border Security Activities

Subsection (a) permits the Secretary of Homeland Security to allow recipients of covered grant (as defined in subsection (c)) to use those funds to cover the costs of enforcing Federal laws aimed at preventing or responding to unlawful entry into the U.S. if those activities are carried out under agreement with a Federal agency.

Section 306 – Center of Excellence for Border Security

Subsection (a) requires the Secretary of Homeland Security to establish a university-based Center for Excellence for Border Security utilizing the same merit-review processes that have been established for selecting University Programs Centers of Excellence.

Subsection (b) requires the Center to prioritize its activities on the basis of risk to address the most significant threats, vulnerabilities and consequences posed by the Nation's borders and border control systems. The activities shall include the conduct of research, the examination of border security technologies and systems, and the provision of education, technical, and analytical assistance for the Department to effectively secure the Nation's borders.

Section 307 – Sense of Congress Regarding Cooperation with Indian Nations

This section is a sense of Congress that in developing the National Strategy for Border Security, the Department of Homeland Security should include recommendations from sovereign Indian Nations, consider whether a Tribal Smart Border working group is necessary, and ensure that border security agencies work cooperatively on issues involving Tribal lands.

Title IV: Detention and Removal

Section 401 – Mandatory Detention for Undocumented Aliens Apprehended at or Between Ports of Entry

Subsection (a) requires the Department of Homeland Security by October 1, 2006, to detain all aliens apprehended at ports of entry or along the international land and maritime borders of the United States until they are removed from the United States or a final decision granting their admission has been determined. The only exceptions to mandatory detention are if the alien departs immediately, such as Mexican nationals who are voluntarily returned across the border, and those paroled due to urgent humanitarian reasons or significant public benefit.

Subsection (b) requires that 60 days after enactment the Secretary implement an interim security measure of requiring a minimum of a \$5,000 bond prior to releasing any alien with a notice to appear.

Subsection (c) is a statutory construction clause that reinforces that nothing in this section limits the rights of any alien to make an asylum claim or deferral of removal based on a fear of persecution, and that nothing changes or alters the current treatment of Cuban aliens under the Immigration and Nationality Act.

Section 402 - Expansion and Effective Management of Detention Bed Space

This section requires the Secretary of Homeland Security, subject to the availability of appropriations, to fully utilize all bed space owned and operated by the Department to full capacity and to utilize all other possible options to cost effectively increase detention capacity including temporary facilities, contracting with state and local jails, and secure alternatives to detention.

Section 403 – Enhancing Transportation Capacity for Unlawful Aliens

Subsection (a) authorizes the Secretary to enter into contracts with private entities to provide secure domestic transportation of aliens apprehended at or between

ports of entry from the custody of the Border Patrol to a detention facility. Subsection (b) requires that under contracts negotiated under subsection (a), the private entity submit an application as required by the Secretary and that the Secretary shall select based on the best combination of service, costs, and security.

Section 404 - Denial of Admission to Nationals of Country Denying or Delaying Accepting Alien

This section amends the Immigration and Nationality Act to require the Secretary of Homeland Security to deny entry into the United States to aliens from countries that refuse or unreasonably delay the repatriation of their nationals from the United States.

Section 405 – Report on Financial Burden of Repatriation

This section requires the Secretary to submit an annual report to the Secretary of State and the Committee on Homeland Security that details the costs to the Department of Homeland Security for repatriating aliens and providing recommendations to more cost effectively repatriate such aliens.

Section 406 – Training Program

This section requires the Secretary to evaluate the training provided to port of entry inspectors and Border Patrol agents to ensure that the appropriate and effective referrals for credible fear determinations of aliens.

Section 407 – Expedited Removal

Subsection (a) amends the Immigration and Nationality Act to provide the authority for expedited removal to the Secretary of Homeland Security rather than the Attorney General and to require that the Secretary place any alien who has not been admitted or paroled, with minor exceptions, into expedited removal if they are apprehended within 100 miles of the border and 14 days of unauthorized entry.

Subsection (b) amends the Immigration and Nationality Act to limit the use of the expedited removal authority in subsection (a) to those aliens apprehended at or between a land border port of entry.

Subsection (c) requires that this section shall take effect upon the date of enactment.

Title V: Effective Organization of Border Security Agencies

Section 501 – Enhanced Border Security Coordination and Management

This section requires the Secretary to ensure full coordination of border security efforts and agencies within the Department of Homeland Security and to remedy any failure of coordination and appropriate integration. The Secretary shall—(1) establish a Secure Borders Program Office; (2) establish a mechanism to ensure greater sharing of intelligence information; (3) establish DHS task forces to better coordinate border enforcement activities; (4) enhance coordination of investigations; (5) examine proper allocation of border security related resources throughout DHS; and (6) establish measures and metrics to determine the effectiveness of coordinated border enforcement efforts.

Section 502 – DHS Office of Air and Marine Operations

Subsection (a) amends the Homeland Security Act to establish an Office of Air and Marine Operations within the Department, to be headed by an Assistant Secretary. The primary mission of the Office is to prevent the entry of terrorists, other unlawful aliens, instruments of terrorism, narcotics and other contraband into the United States. The Office shall operate and maintain the Air and Marine Operations Center (AMOC), and continue to provide radar, communications, and control services to the border security agencies within the Department of Homeland Security and other Federal, state and local agencies as appropriate. This subsection requires that information gathered through the shall be available to other appropriate agencies and that other Departmental agencies provide flight identification information to the AMOC for deconfliction purposes as quickly as possible prior to a initiation of a flight activity.

Subsection (b) makes technical and conforming amendments to the Homeland Security Act to increase the number of authorized Assistant Secretary positions from 12 to 13 and inserts the Office of Air and Marine Operations into the table of contents.

Section 503 – Shadow Wolves Transfer

Subsection (a) requires the Secretary to transfer the Customs Patrol Officers unit operating on the Tohono O’odham Indian reservation (commonly known as the Shadow Wolves) from U.S. Customs and Border Protection (CBP) to U.S. Immigration and Customs Enforcement (ICE) within 90 days after enactment.

Subsection (b) authorizes the Secretary to establish additional units as appropriate within U.S. Immigration and Customs Enforcement.

Subsection (c) assigns the Shadow Wolves to prevent the entry of terrorists, other unlawful aliens, instruments of terrorism, narcotics, and other contraband into the United States.

Subsection (d) provides that the Shadow Wolves receive equivalent pay as a special agent with similar competencies within U.S. Immigration and Customs Enforcement.

Subsection (e) requires that each unit established under this section be supervised by a Chief Customs Patrol Officer with the same rank as a resident agent-in-charge of the Office of Investigations within U.S. Immigration and Customs Enforcement.

Title VI – Terrorist and Criminal Aliens

Section 601: Although aliens who pose a danger to the national security generally are barred from withholding of removal, aliens deportable on terrorist grounds are not expressly barred from such relief. This section bars aliens deportable on terrorist grounds from receiving withholding of removal.

Section 602: In the 2001 decision of *Zadvydas v. Davis*, the Supreme Court ruled that under current law, aliens who had been admitted to the U.S. and then ordered removed could not be detained for more than six months if for some reason they could not be removed. Then, in *Clark v. Suarez-Martinez*, the Court dealt with two Cubans who came to the U.S. during the Mariel boatlift and later committed crimes including assault with a deadly weapon, attempted sexual assault, and armed robbery. The Court expanded its decision in *Zadvydas* to apply to such nonadmitted aliens. Based on the two decisions, the Justice Department and the Department of Homeland Security have had no choice but to release back onto the streets many hundreds of criminal aliens. Jonathan Cohn, Deputy Assistant Attorney General, has testified that “the government is [now] required to release numerous rapists, child molesters, murderers, and other dangerous illegal aliens into our streets. . . . [V]icious criminal aliens are now being set free within the U.S.” Cohn referenced the release of aliens including murderers, a schizophrenic sex offender and pedophiles. Many of these aliens were Mariel Cubans released from Cuban jails or aliens who have received relief from removal pursuant to the Convention Against Torture, which prohibits the return of an alien to a country where there are substantial grounds for believing that he or she would be in danger of being tortured. Almost 900 criminal aliens ordered removed have received CAT relief and have subsequently been released into our communities pursuant to the decisions. This includes at least one alien who was implicated in a

mob-related quintuple homicide in Uzbekistan. Also, one alien removable on terrorism grounds has been released after receiving CAT protection. One of the aliens released has subsequently been arrested for shooting a New York State trooper in the head.

Section 602 allows DHS to detain specified dangerous aliens under orders of removal who cannot be removed, subject to review every six months. Review of these detention provisions are by the federal district court for the District of Columbia.

- Section 603: This section increases penalties and sets mandatory minimum sentences for aliens who fail to depart when ordered removed or obstruct their removal, or who fail to comply with the terms of release pending removal.
- Section 604: While a conviction for an aggravated felony is a ground of deportation, there is no specific ground of inadmissibility for aggravated felons seeking to enter the U.S. This section bars aggravated felons from admission. In addition, it bars the admission of aliens convicted of offenses relating to misuse of Social Security numbers and cards and fraud in connection with identification documents, as well as aliens who have unlawfully procured citizenship and who have committed domestic violence, stalking, child abuse, child neglect, and child abandonment offenses. It would also bar such aliens from seeking a waiver of inadmissibility.
- Section 605: Section 605 bars refugees and asylees with aggravated felony convictions from becoming permanent residents.
- Section 606: This section renders aliens convicted of three or more drunk driving offenses deportable.
- Section 607: Section 607, based on Representative Culberson's "Border Law Enforcement Act of 2005", authorizes and reimburses local sheriffs in the 29 counties along the southern border to enforce the immigration laws if authorized under a separate written agreement pursuant to section 287(g) of the INA, and to transfer illegal aliens to federal custody. It also specifically reimburses those Sheriffs for costs associated with detaining illegal aliens whom they arrest until they are able to hand them over to federal authorities. This provision deems aliens in Sheriffs' custody to be in federal custody once determined to be in an unlawful status.

- Section 608: Crime by alien members of criminal street gangs is exploding. ICE has stated: “The victims of gang crime are not limited to rival gang members. . . . Entire neighborhoods and sometimes whole communities are held hostage by and subjected to the violence of street gangs.” Currently, however, aliens who are members of criminal street gangs are not deportable or inadmissible, and can receive asylum and TPS (temporary protected status), until they are convicted of a specified criminal act. Many of the members in the United States of the international criminal gang Mara Salvatrucha-13 are present in the U.S. under TPS. Section 608, based on Representative Forbes’s “Alien Gang Removal Act of 2005”, renders alien gang members deportable and inadmissible, mandates their detention, and bars them from receiving asylum or TPS. The section adopts procedures similar to those used by the State Department to designate foreign terrorist organizations, to enable the Attorney General to designate criminal street gangs for purposes of the immigration laws.
- Section 609: Section 609 bars aliens removable on terrorist grounds from becoming naturalized citizens. It also prevents aliens in removal proceedings from obtaining naturalization while those proceedings are pending, clarifies that conditional permanent residents must have the conditions on their residence removed before they can be naturalized, and suspends naturalization petitions while the petitioner is in removal proceedings. Currently, aliens can go to District Court if their naturalization applications have been pending with DHS for more than 120 days. Section 209 gives DHS 180 days to adjudicate these applications, and limits District Court relief to remand for adjudication by DHS. Finally, the section modifies the terms of district court review of denied naturalization applications.
- Section 610: Section 610 allows the Secretary of Homeland Security to utilize, at the Secretary’s discretion, expedited procedures to remove aliens who are subject to removal on criminal grounds and who are not eligible for relief.
- Section 611: The REAL ID Act was designed to ensure the removal of aliens tied to terrorist organizations. However, aliens currently in deportation proceedings initiated before the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 claim that the REAL ID Act does not apply to them. Section 611 clarifies that the amendments in the terrorist grounds of removal in the REAL ID Act are to be applied to aliens in all removal, deportation, and exclusion cases, regardless of when those cases were initiated.

- Section 612: Applicants for certain immigration benefits, including naturalization and cancellation of removal must demonstrate “good moral character”. Section 612 amends the definition of good moral character to exclude any alien who is described in the section of the INA listing aliens who are inadmissible for terrorism and security-related reasons. The section clarifies that the aggravated felony bar to good moral character applies regardless of when the crime was classified as an aggravated felony and clarifies the discretionary authority of DHS to find an alien not to be of good moral character for reasons other than an express bar, and may be based upon actions that did not occur within the requisite period of time for which good moral character must be established. In addition, the section clarifies that an alien who has been convicted of an aggravated felony at any time does not have good moral character.
- Section 613: “Sexual abuse of a minor” is an aggravated felony for immigration purposes. Section 613 clarifies that the age of the victim may be proved by evidence in the conviction record or extrinsic evidence. The section also prevents state courts from interfering in federal immigration law by reversing or vacating convictions after they have been entered in order to forestall removal.
- Section 614: This section renders removable aliens who have unlawfully procured citizenship as well as aliens convicted of offenses relating to misuse of Social Security numbers and cards and fraud in connection with identification documents.

Title VII - Employment Eligibility Verification

The Immigration Reform and Control Act of 1986 made it unlawful for employers to knowingly hire or employ aliens not eligible to work and required employers to check the identity and work eligibility documents of all new employees. The Act was designed to end the “job magnet” that draws the vast majority of illegal aliens to the United States. Under IRCA, if the documents provided by an employee reasonably appear on their face to be genuine, an employer has met its document review obligation. Unfortunately, the easy availability of counterfeit documents has made a mockery of IRCA. Fake documents are produced by the millions and can be obtained cheaply. Thus, the current system both benefits unscrupulous employers who do not mind hiring illegal aliens but want to show that they have met legal requirements and harms employers who don’t want to hire illegal aliens but have no choice but to accept documents they know have a good likelihood of being counterfeit.

In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress responded to the deficiencies of IRCA by establishing three employment eligibility verification pilot programs for volunteer employers in selected states. Under the basic pilot program, the

Social Security numbers and alien identification numbers of new hires are checked against Social Security Administration and Department of Homeland Security records in order to weed out fraudulent numbers and thus to ensure that new hires are genuinely eligible to work. A 2001 report on the basic pilot program found that “an overwhelming majority of employers participating found the basic pilot program to be an effective and reliable tool for employment verification” -- 96% of employers found it to be an effective tool for employment verification; and 94% of employers believed it to be more reliable than the IRCA-required document check. In 2003, Congress extended the basic pilot program for another five years and made it available to employers nationwide.

The basic pilot works as follows:

- An employer has three days from the date of hire to make an inquiry by phone or other electronic means to the confirmation office. If the new hire claims to be a citizen, the employer will transmit his or her name and Social Security number. If the new hire claims to be a non-citizen, the employer will transmit his or her name, alien identification number and Social Security number.
- The confirmation office will compare the name and Social Security number provided against information contained in Social Security Administration records and, if necessary, will compare the name and DHS-issued number provided against information contained in DHS records.
- If in checking the records, the confirmation office ascertains that the new hire is eligible to work, the operator will within three days so inform the employer. If the confirmation office cannot confirm the work eligibility of the new hire, it will within three days so inform the employer of a tentative nonconfirmation.
- If a new hire does not contest the tentative nonconfirmation, it shall be considered a final nonconfirmation. If a new hire wishes to contest the tentative nonconfirmation, secondary verification will be undertaken. Secondary verification is an expedited procedure set up to confirm the validity of information contained in the government records and provided by the new hire. Under this process, the new hire will typically contact or visit the SSA and/or DHS to see why the government records disagree with the information he or she has provided. If the new hire requests secondary verification, he or she cannot be fired on the basis of the tentative nonconfirmation.
- If the discrepancy can be reconciled within ten days, then confirmation of work eligibility will be given to the employer by the end of this period. If the discrepancy cannot be reconciled within ten days, final denial of confirmation will be given by the end of this period. The employer then has two options. It can dismiss the new hire as being ineligible to work in the United States or it can continue to employ the new hire. If the employer continues to employ the new hire, it must notify DHS of this decision or be

subject to penalty. If legal action is brought by the government subsequent to such notification, the employer is then subject to a rebuttable presumption that it has knowingly hired an illegal alien.

Title VII will make participation in the basic pilot program mandatory for all employers within two years of enactment. It will also expand the system to provide for verification of previously-hired employees. Employers will be able to use the system to verify previously-hired employees on a voluntary basis (as long as they do not do so in a discriminatory manner) two years after enactment. By three years after enactment, federal, state, and local governments and the military must verify the employment eligibility of all workers who have not been previously subject to verification under the system, as must other employers for those employees working at federal, state or local government buildings, military bases, nuclear energy sites, weapons sites, airports, and critical infrastructure sites. By six years after enactment, all employers must verify the employment eligibility of all workers who have not been previously subject to verification under the system.

The title requires DHS to investigate situations in which a social security number is submitted more than once by the same employer, or where a social security number is submitted by multiple employers, in a manner that suggests fraud. The title exempts employers from liability who rely in good faith on information provided by the verification system. The title also applies employment eligibility verification requirements to day labor sites and other hiring halls. The title establishes civil penalties for failure to comply with the employment eligibility verification requirements.

The title requires the Social Security Administration to conduct a study on the cost and administrability of requiring hardened, secure Social Security cards with an electronic strip and digital photograph; the creation of a unified database between SSA and DHS for employment eligibility verification; and a requirement that employers verify employment eligibility verification of new hires by swiping the secure social security card through an electronic card-reader.

Title VIII – Immigration Litigation Abuse Reduction

Section 801: The Ninth Circuit has given aliens additional opportunities to needlessly hinder their removal by requiring the Board of Immigration Appeals to remand cases in which it has reversed an immigration judge decision granting an alien relief back to the IJ for entry of the decision. Section 801 expressly provides the BIA authority to reverse an IJ decision and enter an order of removal without remanding to the IJ.

Section 802: DHS's efforts to remove dangerous aliens has been impeded by its inability to

remove aliens whose wrongly issued visas were revoked after they entered the United States. The House corrected this problem in last year's Intelligence Reform Bill by making visa revocation a ground of removal, but the Senate added in conference a clause allowing aliens facing removal to seek judicial review of their visa revocations. Because the Senate action threatens the core principle of judicial nonreviewability of consular decisions and risks the disclosure of classified information regarding terrorist aliens, section 402 strikes such judicial review.

- Section 803: In a recent decision, the Ninth Circuit has barred DHS from reinstating removal orders of aliens who illegally reenter the U.S. after having been removed – forcing the wasting of prosecutorial and judicial resources to seek new removal orders. Section 403 would allow the reinstatement of prior removal orders of returning aliens.
- Section 804: “Withholding of removal” is a form of protection that, while similar to asylum, differs in two important respects: (1) it is nondiscretionary and (2) to receive this benefit, the alien must meet a higher standard of proof than asylum. In the REAL ID Act, Congress amended the asylum motivation standard to require an asylum applicant show that one of the five protected characteristics would be “at least one central reason” for harm in order to receive asylum. Section 404 clarifies that the REAL ID motivation standard for asylum applies to withholding.
- Section 805: Section 805 responds to the filing of meritless appeals of removal orders by establishing a screening process for aliens’ appeals of BIA decisions. Under this provision, appeals will be referred to a single circuit court judge for initial review. If that judge decides that the alien has made a substantial showing that the alien’s petition for review is likely to be granted, the judge will issue a “certificate of reviewability” allowing the case to proceed to a three-judge panel.
- Section 806: Currently, aliens seeking to enter the United States under the visa waiver program must waive access to Immigration Court to challenge removal by any means other than asylum. No similar restriction is placed on the other nonimmigrants who are admitted annually. Section 806 would impose the same review conditions on all nonimmigrant visas that now apply only to visa waiver admissions, and require aliens seeking to enter temporarily to waive their ability to contest, other than through asylum, any action to deny them admission or remove them.